NO. 49659-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RONALD MA'AE,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT DEPARTMENT OF LABOR AND INDUSTRIES

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I. INTRODUCTION

In order to improve the care of injured workers, the Legislature created a network of well-qualified medical providers who meet quality of care standards and who follow medical best practices in treating injured workers. Ronald Ma'ae challenges a Department of Labor and Industries' rule that implements this network under the Industrial Insurance Act.

Only network providers may treat injured workers, with limited exceptions. RCW 51.36.010(2)(b). A nonnetwork provider may only provide medical care to an injured worker for "an initial office or emergency room visit" following an industrial injury. RCW 51.36.010(2)(b). At the time the Legislature created the initial visit limitation, "initial visit" was defined as the first visit to a health care provider in which a worker fills out a report of injury or occupational disease, which is used to seek workers' compensation benefits. WAC 296-20-01002. The Legislature did not change this definition. Since a nonnetwork provider cannot provide any care after the initial injury report is filed, a nonnetwork provider cannot provide care to an injured worker for an aggravation of the injury that occurred after the claim was closed, which often occurs years after the initial report of injury.

WAC 296-14-400, the challenged rule, specifies that "medical treatment and documentation for reopening applications must be

completed by network providers." This rule ensures that only qualified medical professionals who follow occupational best health practices perform exams and make judgments about whether a worker's condition has become worse or aggravated. In the absence of this statutory requirement, workers face ill-informed medical providers.

Ma'ae's rules challenge to WAC 296-14-400 has no merit. The rule amendment appropriately implements RCW 51.36.010 and neither exceeds statutory authority nor is arbitrary and capricious. This Court should affirm and hold that WAC 296-14-400 is a valid legislative rule.

II. STATEMENT OF THE ISSUES

1. RCW 51.36.010 provides that only network providers may treat injured workers, except for "an initial office or emergency room visit." WAC 296-20-01002 defines initial visit as the first visit to a health care provider that results in filing a report of injury or occupational disease. A reopening application occurs after treatment on the initial injury concludes and the claim is closed. Does WAC 296-14-400's requirement that only network providers provide treatment and documentation for a worker's reopening application appropriately implement RCW 51.36.010?

2. The rulemaking file for WAC 296-14-400 shows that the Department considered (1) the statutory language of RCW 51.36.010, (2) the context in which a provider completes a reopening examination and documentation, and (3) RCW 51.36.010's overarching legislative intent to improve the quality of injured workers' medical care. Did the Department consider the relevant facts and circumstances when it amended WAC 296-14-400 such that the rule is not arbitrary and capricious?

III. STATEMENT OF THE CASE

A. The Legislature Created the New Provider Network to Improve the Quality of Care Provided to Injured Workers

Before 2011, medical providers needed only a valid clinical license and to complete a short application to treat injured workers. The Legislature recognized that this system resulted in some providers failing to adhere to occupational health best practices, which caused longer periods of disability, reductions in family incomes, and increases in insurance costs. Laws of 2011, ch. 6, § 1. In 2011, the Legislature created a new system designed to provide high quality care to injured workers: the medical provider network. Laws of 2011, ch. 6, § 1; RCW 51.36.010(1).

There are now over 25,000[1] providers in the network, and they work in private clinics, emergency rooms, and hospitals across the state. Workers can locate a provider by using the Department's website.[2]

The new provider network ensures that workers receive treatment only from providers who provide high quality medical care and who follow current occupational health best practices. Laws of 2011, ch. 6, § 1; RCW 51.36.010(1). To achieve this legislative purpose, the Legislature mandated the Department only accept providers in the network who meet

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[1] http://www.lni.wa.gov/ClaimsIns/Providers/ProjResearchComm/PNAG/ACHIEV012617/KarenMPNUpdate.pdf

[2] www.findadoctor.lni.wa.gov

minimum standards and who follow the Department's "evidence-based coverage decisions and treatment guidelines" and policies. Laws of 2011, ch. 6, § 1; RCW 51.36.010(1).

When creating the network, the Legislature imposed some mandatory requirements and left the rest of the details to the Department's discretion. Laws of 2011, ch. 6, § 1; RCW 51.36.010(1), .010(2)(c), .010(10). The Legislature granted the Department broad authority to adopt policies for the "development, credentialing, accreditation, and continued oversight of a network of health care providers used to treat injured workers." Laws of 2011, ch. 6, § 1; RCW 51.36.010(2)(c). The Legislature gave the Department broad authority to adopt rules implementing RCW 51.36.010. Laws of 2011, ch. 6, § 1; RCW 51.36.010(10).

To ensure high quality medical care, the Legislature prohibited nonnetwork providers from caring for injured workers with limited exceptions. RCW 51.36.010(1), .010(2)(a). The Legislature provided that "once a provider network is established in the worker's geographic area, an injured worker may receive care from a nonnetwork provider only for an initial office or emergency room visit" following an industrial injury. RCW 51.36.010(2)(b).

B. Medical Providers Are Integral to the Workers' Compensation System, Including Reopening Decisions

Workers may file industrial insurance claims for industrial injuries or occupational diseases. RCW 51.28.020; RCW 51.08.100, .140. In administering the claim, the Department first accepts a report of injury or occupational disease that serves as an application for benefits. RCW 51.28.020. The worker's doctor aids in completing it. RCW 51.28.020. And a nonnetwork provider may file the form. RCW 51.36.010(2)(b).

Once the Department allows a claim, the Department pays for treatment—provided that it is "proper and necessary" treatment under RCW 51.36.010 and the medical aid rules in WAC 296-20. Workers may only receive care from network providers when the claim is open. RCW 51.36.010(2)(b). Workers may receive benefits that require certifications from network providers. For example, a doctor may certify that a worker is or is not able to work for the purposes of wage replacement benefits (time loss compensation). RCW 51.32.090(4)(b); WAC 296-20-01002 (definition of "temporary partial disability").

Once the worker's medical provider concludes treatment, the Department evaluates the worker to determine if the worker has a permanent disability. RCW 51.32.055, .060, .080; *Franks v. Dep't of Labor & Indus.*, 35 Wn.2d 763, 766-67, 215 P.2d 416 (1950). The

Department then closes the claim.

If the worker's condition worsens after the Department has closed the claim, he or she may apply to reopen the claim and a doctor assists with the application. RCW 51.32.160; WAC 296-14-400; WAC 296-20-06101.[3] The Department's rules provide that only network providers may examine the worker and complete the reopening application. RCW 51.36.010(2)(b); WAC 296-14-400. The Department does not accept applications from nonnetwork providers. RCW 51.36.010(2)(b); WAC 296-14-400.

The Department reimburses any network provider for the reopening application examination, documentation, and diagnostic tests regardless of whether the Department reopens the claim. WAC 296-20-097. But the Department only reimburses network providers and does not pay nonnetwork providers for reopening examinations, documentation, or diagnostic tests. RCW 51.36.010; WAC 296-14-400; WAC 296-20-015. So if a worker goes to a nonnetwork provider for an examination to complete a reopening application, not only does the Department not accept the application, but the Department does not pay for the visit, creating a

[3] The complete text of WAC 296-14-400, RCW 51.36.010, and RCW 51.32.160 is contained in the Appendix.

risk that the worker could be responsible for the cost.[4] RCW 51.36.010; WAC 296-14-400; WAC 296-20-015. This harms the worker who may then appeal a Department decision denying reopening to the Board, and then needlessly incur costs and the wasted time and disappointment of an unsuccessful appeal. *See* RCW 51.52.060 (parties may appeal to the Board); RCW 51.52.120 (parties responsible for own attorney fees at the Board); WAC 263-12-117(1) (each party bears costs of medical deposition testimony at Board).

To succeed in reopening a claim, a worker has to provide medical evidence to the Department that (1) his or her condition worsened after the original injury, (2) the original injury caused the worsening, (3) his or her condition worsened between the time the claim closed and time sought to reopen the claim, and (4) the worsening warranted more treatment or disability award beyond what the Department had previously provided. *Phillips v. Dep't of Labor &Indus.*, 49 Wn.2d 195, 197, 298 P.2d 1117 (1956); *Cooper v. Dep't of Labor & Indus.*, 188 Wn. App. 641, 648, 352 P.3d 189 (2015); *see also Tollycraft Yachts Corp. v. McCoy*, 122 Wn.2d 426, 432, 858 P.2d 503 (1993) (in a reopening application "the burden is

[4] The Department's position is that a nonnetwork provider who treats an injured worker can neither bill the injured worker for that treatment nor receive payment from the Department. *See* WAC 296-20-020, -022. The provider, however, could argue that it is entitled to payment and should be able to bill the worker for care since such treatment is outside the scope of the Industrial Insurance Act.

on the injured worker to produce some objective medical evidence, verified by a physician, that his or her injury has worsened *since* the initial closure of the claim.").

When advising a worker about whether his or her condition has worsened and then completing a reopening application, a doctor obtains a detailed history from the patient to understand the previous injury, determines whether the worker sustained any new injuries or illnesses, and examines the worker to assess whether there are medical findings that support objective worsening of the worker's condition since claim closure. CP 265-66.

If the Department receives a reopening application from the provider that shows by "'sufficient medical verification [that there is] disability related to the accepted condition(s)'" the Department will reopen the claim and pay benefits. WAC 296-14-400. The Department will pay for treatment received 60 days before the doctor filed the reopening application, provided a network provider treats the worker. RCW 51.36.010; WAC 296-20-097.

C. The Department Amended WAC 296-14-400 to Implement RCW 51.36.010(2)(b)'s Limitation of Nonnetwork Care

Reopening applications became the subject of rulemaking after RCW 51.36.010's amendments became law. Under the legislative

directive of RCW 51.36.010(2)(c), the Department convened the Provider Network Advisory Group (PNAG), which includes representatives from the Industrial Insurance Medical Advisory Committee, Industrial Insurance Chiropractic Advisory Committee, business, and labor. CP 172-73.[5] The Department, in open and public meetings, collaborated with PNAG to adopt rules necessary to implement the provider network. CP 68-110, 172-73.

The Department and PNAG considered whether to amend existing rules to clarify the meaning of an initial visit and the roles of nonnetwork providers and network providers to "ensure ongoing care is delivered by network providers." CP 155. During this phase of rulemaking, the Department and PNAG worked to clarify the meaning of an initial visit under RCW 51.36.010(2)(b) in the context of care before filing a report of accident or occupational disease, care at a follow-up visit or emergency hospitalization, and care in the context of an application to reopen a claim. CP 69, 171-72.[6]

The Department and PNAG considered that the meaning of initial visit could be the "first time an injured worker sees a health care provider

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[5] The Industrial Insurance Medical Advisory Committee is a group of 14 medical experts who advises the Department. RCW 51.36.140.

[6] *See* WAC 296-20-015; WAC 296-20-025; WAC 296-20-065; WAC 296-20-075; WAC 296-20-12401; WAC 296-14-400.

for treatment of a workplace injury/illness." CP 73. The Department and PNAG also reviewed the Department's medical aid rules, which defined an "initial visit" as the "first visit to a health care provider during which the Report of Industrial Injury or Occupational Disease is completed and the worker files a claim for workers' compensation." CP 75; WAC 296-20-01002.

The Department and PNAG concluded that medical treatment and documentation for an application to reopen a claim does not constitute an initial visit under RCW 51.36.010(2)(b). CP 89-92. In arriving at this conclusion, the Department and PNAG considered the reopening process, which requires the Department to make a determination as to whether to reopen a claim based on medical examination and documentation of an aggravation of an industrial injury months or years after the Department closed the claim. CP 89-90, 265-66. The Department and PNAG also considered the underlying intent of the Legislature in enacting RCW 51.36.010 to increase the quality of care provided to injured workers by "reduc[ing] the influence of providers who do not meet network standards." CP 92, 104.

After consulting with PNAG, whose business, labor, and provider members approved the draft language, the Department proceeded with rulemaking to amend WAC 296-14-400 to implement RCW

51.36.010(2)(b):

> For services or provider types where the department has established a provider network, beginning January 1, 2013, medical treatment and documentation for reopening applications must be completed by network providers.

WAC 296-14-400; CP 155-86, 204-40. WAC 296-14-400 was adopted as a significant legislative rule on March 6, 2012. CP 157, 196-97, 227. Although in the Department's and PNAG's view RCW 51.36.010(2)(b) already prohibits nonnetwork providers from examining workers and completing reopening applications, the Department adopted the rule to better inform health care providers about the limitations of nonnetwork providers and to direct workers' care to network providers as soon as possible. CP 104, 155, 163.

D. After Ma'ae Challenged the Amendment to WAC 296-14-400 in Superior Court, the Court Upheld the Rule

The Department applied the amendment to WAC 296-14-400 to Ma'ae. The Department had allowed his claim for industrial insurance benefits after he sustained a 2007 industrial injury. CP 289. The Department closed the claim in 2009. CP 289. On May 14, 2014, H. Richard Johnson, M.D., examined Ma'ae in order to request that the Department reopen Ma'ae's claim. CP 290. Dr. Johnson is not a member of the Department's provider network. CP 290. On April 14, 2014, Dr. Johnson filed a reopening application on behalf of Ma'ae. CP 290. The

Department rejected this reopening application under WAC 296-14-400 because Dr. Johnson was not a network provider. CP 290.

Ma'ae appealed to the Board of Industrial Insurance Appeals, which reversed the Department order. Over a dissent, the majority said that WAC 296-14-400 was not a legislative rule because it was not authorized by RCW 51.36.010 based on its conclusion that the statute did not provide for the Department to determine the qualifications of a provider who assists the worker in filing an application to reopen a claim. *In re Ronald Ma'ae*, No. 14 21595, 2015 WL 7873351, at *4-*6. (Wash. Bd. Ind. Ins. Appeals Nov. 23, 2015). The Department appealed this decision, and this case is before the Court in another case, *Department of Labor & Industries v. Ma'ae*, No. 50130-9-II.[7]

Separate from the Board litigation in the other case, Ma'ae challenged the validity of the Department's amendment to WAC 296-14-400 in superior court—the case here. CP 271-86. The superior court ruled that WAC 296-14-400: (1) did not exceed the Department's statutory authority under 34.05.570(2)(c), (2) was not arbitrary and capricious under RCW 34.05.570(2)(c), and (3) was a valid rule. CP 335-36. Ma'ae

[7] The cases are not consolidated; however, accompanying this brief is a request that the Court consider these cases together in oral argument. The Department does not object to the Court issuing one opinion for both cases.

appeals.

IV. STANDARD OF REVIEW

Ma'ae has challenged the validity of WAC 296-14-400 under the Administrative Procedure Act (APA). The APA places "[t]he burden of demonstrating the invalidity of agency action . . . on the party asserting invalidity." RCW 34.05.570(1)(a). The court reviews the validity of an agency rule de novo. *Ass'n of Wash. Bus. v. Dep't of Revenue*, 155 Wn.2d 430, 437, 120 P.3d 46 (2005).

The court also interprets statutes and rules de novo. *See Birrueta v. Dep't of Labor & Indus.*, 186 Wn.2d 537, 542-43, 379 P.3d 120 (2016). Although an agency interpretation does not bind the court, the court defers to an agency's interpretation of a law when that agency has specialized expertise in dealing with such issues. *PT Air Watchers v. Dep't of Ecology*, 179 Wn.2d 919, 925, 319 P.3d 23 (2014). The court defers to the Department when the Department and the Board conflict in their interpretations because the Department is the executive agency charged by the Legislature to administer the statute. *Dep't of Labor & Indus. v. Slaugh*, 177 Wn. App. 439, 452, 312 P.3d 676 (2013); *see also Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 594, 90 P.3d 659 (2004) (deferring to Department of Ecology, not the Pollution Control Hearings Board).

V. ARGUMENT

To increase the quality of workers' medical care, to provide better treatment outcomes, and to reduce economic loss, the Legislature created a network of doctors who are qualified to provide occupational health care and who use occupational health best practices:

> The legislature finds that high quality medical treatment and adherence to occupational health best practices can prevent disability and reduce loss of family income for workers, and lower labor and insurance costs for employers. Injured workers deserve high quality medical care in accordance with current health care best practices.

RCW 51.36.010(1). To implement the network, the Legislature mandated the Department only accept providers in the network that meet minimum standards and prohibited nonnetwork providers from treating injured workers, with limited exceptions. RCW 51.36.010(2)(b). Under this statute and WAC 296-14-400, a nonnetwork provider cannot examine and assist a worker to complete a reopening application.

The Department's regulation appropriately informs providers and workers of this limitation. WAC 296-14-400. Treating reopening applications differently than the initial report of injury is not just a technicality. It reflects the very different medical and legal posture of the two situations. An initial report of injury is filed after an initial visit that happens soon after the industrial injury occurs or the occupational disease

arises. After an injury, a worker would naturally go to his or her own family doctor, who may or may not be in the network. But once the Department allows the claim, a worker may only see network providers, so when a worker seeks to reopen a claim, it would be natural to go to the worker's network provider. But more fundamentally, determining reopening requires a specific medical inquiry into determining whether objective worsening has occurred, and network providers would be better informed about this requirement. *See Tollycraft*, 122 Wn.2d at 432 (injured worker must produce objective medical evidence that injury has worsened). Requiring network providers complete reopening examinations and documentation serves workers' interests in multiple ways by:

- Providing high quality medical care: Network providers are more knowledgeable about the medical evidence (*e.g.*, objective findings) necessary to reopen a claim and must adhere to occupational health best practices in providing care for an injured worker in the reopening context.

- Avoiding ill-informed opinions: Because of the demonstrated low quality care and lack of expertise, nonnetwork providers may not fully understand the requirement to provide objective findings to support reopening.

- Avoiding needless examinations of the worker: The Department only permits and pays for examinations performed by a network provider. WAC 296-20-015; WAC 296-14-400

- Avoiding needless litigation costs: Workers may rely on faulty reopening applications by nonnetwork providers to appeal Department denials and then incur the costs of an unsuccessful appeal. RCW 51.52.060; RCW 51.52.120; WAC 263-12-117(1)

A. WAC 296-14-400 Implements RCW 51.36.010 by Ensuring That Only Qualified Experts Provide Care to Workers To Reopen Claims

Strictly speaking, the Department could have elected not to adopt a reopening rule and the statute's plain language would have still dictated that nonnetwork provider could not examine a worker and complete a reopening application. This is because the statute provides that "an injured worker may receive care from a nonnetwork provider only for an initial office or emergency room visit." RCW 51.36.010(2)(b). But to implement the network-exclusivity mandate, the Department adopted a rule to better inform workers and providers about the network provider's responsibilities and to direct workers' care to network providers as soon as possible. CP 104, 155, 163-64.

The Department did not exceed its statutory authority in adopting the nonnetwork provider limitation rule under RCW 34.05.570(2)(c) because (1) the Legislature has not excepted reopening applications exams and documentation from the network provider requirements, (2) an exam to complete a reopening application is not an initial visit, and (3) a doctor who assists a worker with a reopening application provides "care" to that worker under RCW 51.36.010.

1. While the Legislature chose to except initial office and emergency room visits from the network requirements,

it did not except reopening exams and documentation, and so only network providers may perform them

The Legislature created a network of qualified medical providers to provide injured workers covered by the Industrial Insurance Act with the "high quality medical care" they deserve. RCW 51.36.010(1). To further this purpose, the Legislature restricted the treatment or care an injured worker could receive by a nonnetwork provider, mandating that:

> once a provider network is established in the worker's geographic area, an injured worker may receive care from a nonnetwork provider only for an initial office or emergency room visit.

RCW 51.36.010(2)(b).

In interpreting this statute, the Court must carry out the Legislature's intent shown in the statute's plain language. *State v. Larson*, 184 Wn.2d 843, 848, 365 P.3d 740 (2015). The court discerns plain meaning from (1) the ordinary meaning of the language at issue, (2) the context of the statute in which that provision is found, (3) related provisions, and (4) the statutory scheme as a whole. *Id.*; *Dep't of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 12, 43 P.3d 4 (2002).

Here, the text, context, related provisions, and statutory scheme support that RCW 51.36.010's plain language restricts nonnetwork providers from treating injured workers to the situation of an initial office or emergency room visit. This is the means of ensuring that workers

receive care from qualified network providers. WAC 296-14-400's prohibition on a nonnetwork provider completing an application to reopen a claim is fully consistent with the statute because a provider caring for a worker in a reopening context is necessarily not caring for a worker for an initial office or emergency room visit.

The Legislature only excepted initial office or emergency room visits from network provider requirements. To express one thing in a law implies the exclusion of the other. *In re Det. of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002) (finding that express statutory exceptions to incarceration instead of commitment in mental institution excluded the carving out of further exceptions). By not excepting visits for reopening examinations, the Legislature has precluded nonnetwork providers from acting in the reopening context.

The plain language provides that only under the circumstance of an initial office or emergency room visit may a nonnetwork provider care for workers. Because the statute's plain language dictates that nonnetwork providers cannot examine a worker and complete a reopening application, a rule was not strictly necessary. But the Department amended WAC 296-14-400 to better inform workers and providers about the limitations of nonnetwork providers, and the amendment echoes RCW 51.36.010(2)(b)'s requirements. CP 104, 155, 163-64. In doing this, the Department created

a legislative rule that binds parties and amends a policy or regulatory program. RCW 34.05.328(5)(c)(iii)(C); CP 157, 197. The Board was incorrect in its *Ma'ae* decision that the rule is not a legislative rule. *See Ma'ae*, 2015 WL 7873351, at *5; CP 157, 197. In this case and in *Department of Labor & Industries v. Ma'ae*, No. 50130-9-II, the Department asks that this Court hold that WAC 296-14-400 is a valid legislative rule that the Board must follow. CP 157, 197.

2. A visit regarding reopening, which occurs after the Department closes the claim, is not an "initial visit"

A nonnetwork provider may be seen "only" for an "an initial office or emergency room visit" after the industrial injury. An examination to complete a reopening application is not an initial visit. The Department has long held the view that an initial visit is the worker's first visit to a health care provider to fill out the application for a claim of worker's compensation benefits after an industrial injury occurs or an occupational disease arises and codified that understanding in WAC 296-20-01002's definition of "initial visit" in 2008. Wash. St. Reg. 08-02-021, at 7. Ignoring this provision, Ma'ae apparently assumes that an assessment for reopening is an initial visit. Appellant's Br. 16, 20.[8] He is wrong.

[8] Ma'ae's briefing is oblique as to whether filing a reopening application is an initial visit. *See* Appellant's Br. 16, 20. Ma'ae had additional arguments below on this subject that he has elected not to elaborate on in his appellant's brief, and he cannot raise

The plain meaning of an initial visit is the *first time* an injured worker visits a health care provider for treatment of a workplace injury or occupational disease and completes a report of accident or occupational disease. This is the stage when a doctor first diagnoses the worker for an injury. At the time that the Legislature amended RCW 51.36.010, the Department had already defined an "initial visit" in WAC 296-20-01002. CP 75. Under the rule, an "initial visit" is defined as:

> the first visit to a healthcare provider during which the Report of Industrial Injury or Occupational Disease is completed and the worker files a claim for workers' compensation.

WAC 296-20-01002. The court gives great weight to an agency's definition of an undefined statutory term where the agency has the duty to administer the statutory provisions. *Phillips v. City of Seattle*, 111 Wn.2d 903, 908, 766 P.2d 1099 (1989). And the courts presume that the Legislature is aware of regulations, and here the Legislature has acquiesced to WAC 296-20-01002's definition by not changing it when it amended RCW 51.36.010. *Cf. Manor v. Nestle Food Co.*, 131 Wn.2d 439, 445 n.2, 932 P.2d 628, *amended*, 945 P.2d 1119 (1997) (court acquiesces to regulatory language when it does not change statute after rule's

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them in his reply. *See* CP 279-81; *Joy v. Dep't of Labor & Indus.*, 170 Wn. App. 614, 629-30, 285 P.3d 187 (2012) (a party who gave only passing treatment to an argument in appellant's brief could not elaborate on it in her reply).

adoption), *disapproved on different grounds by Wash. Indep. Tel. Ass'n v. Utils. & Transp. Comm'n*, 148 Wn.2d 887, 64 P.3d 606 (2003). The Legislature did nothing to signal that it intended to depart from WAC 296-20-01002's definition of "initial visit."

Here the Court should only look to WAC 296-20-01002's definition of initial visit; however, the dictionary confirms that this definition is consistent with the ordinary meaning of the term. *See State v. Watson*, 146 Wn.2d 947, 956, 51 P.3d 66 (2002) (a court may use a dictionary to ascertain a term's ordinary meaning.). "Initial" means "beginning." *Webster's Third International Dictionary* 1163 (2002). The Legislature's use of the word "initial" meaning "beginning" shows that non-emergency room care from a nonnetwork provider is limited to a first visit or the first time an injured worker seeks treatment for the industrial injury or occupational disease.

Further, the Legislature's use of the word "only" signifies that the Legislature intended for an injured worker to receive care from a nonnetwork provider *only* for a first or emergency room visit. Specifically, the use of "only" as opposed to "including, but not limited to" indicates that the Legislature carved out one limited exception for an initial office or emergency room visit. Because a doctor examines a worker and then completes a reopening application likely years after the initial injury, a

visit regarding reopening is not an initial visit. CP 89-92, 265-66. So the Department did not exceed its authority in limiting care in the reopening context to network providers because this is not the initial visit context.

3. A doctor who assists a worker with a reopening application provides "care" to that worker within RCW 51.36.010's meaning

The Department's broad rulemaking authority allows it to clarify that a nonnetwork provider cannot complete a reopening application. RCW 51.36.010(10) allows the Department to adopt rules to implement this provision: "the department may adopt rules related to this section." In "this section" is the provision that "an injured worker may receive *care* from a nonnetwork provider only for an initial office or emergency room visit." (Emphasis added.) RCW 51.36.010(2)(b). A provider "cares" for or treats a worker by completing an application to reopen a claim because he or she needs to examine the worker, make a diagnosis, and make a specific curative treatment plan. CP 265-66. When amending WAC 296-14-400, the Department acted within its broad statutory authority to regulate the medical "care" of a worker. RCW 51.36.010(2)(b).

The purpose of the regulation is to regulate *who* examines a worker and documents worsening in a reopening application, not *what* the application looks like. Ma'ae cites *Donati v. Department of Labor & Industries*, 35 Wn.2d 151, 211 P.2d 503 (1949), for the proposition that a

reopening application does not need to be in any particular form provided it is in writing and gives the Department information regarding the reasons for the application for that worker. Appellant's Br. 18. This is a red herring. WAC 296-14-400 does not mandate a specific form as the Department allows workers to file informal requests to reopen without accompanying medical substantiation and then the Department provides the form asking for medical information to the worker to provide the necessary medical substantiation:

> A formal application occurs when the worker and doctor complete and file the application for reopening provided by the department. Upon receipt of an informal request without accompanying medical substantiation of worsening of the worker's condition, the department or self-insurer shall promptly provide the necessary application to the worker for completion. For services or provider types where the department has established a provider network, beginning January 1, 2013, medical treatment and documentation for reopening applications must be completed by network providers.

WAC 296-14-400. It is this medical substantiation—including medical care and documentation of this care—that requires a network provider. In other words, the issue is not about what the form looks like—it is about who may provide medical substantiation. Providing the care necessary to determine whether an aggravation has occurred and completing the application to document this aggravation go hand in hand—a doctor needs to examine the worker in order to complete the application and provides

care to a worker by doing so.

Requiring medical substantiation is appropriate because to support a claim for reopening a worker has the burden to provide objective medical evidence of worsening. *Tollycraft*, 122 Wn.2d at 433; *Phillips*, 49 Wn.2d at 197. Claimants who claim rights under the Industrial Insurance Act are held "to strict proof of their right to receive the benefits provided by the act." *Robinson v. Dep't of Labor & Indus.*, 181 Wn. App. 415, 427, 326 P.3d 744 (2014) (citations omitted).

WAC 296-14-400's amendments do not elevate form over substance, contrary to Ma'ae's argument. *See* Appellant's Br. 19. This is because, contrary to the Board's reasoning in *Ma'ae*, the completion of a reopening application is not in the "nature of an administrative function." *Ma'ae*, 2015 WL 7873351, at *5. *Tollycraft* rejected that the reopening process is a "paper act." 122 Wn.2d at 433. When examining the deadlines regarding processing reopening applications, the Court concluded that the Department's act of reopening reflects a "substantive decision by the Department that the injured employee has met the criteria of the statute to show aggravation. In other words, the Department has concluded there has been objective worsening of the injured worker's condition." *Id.*

In this context, a provider provides medical care to a worker when completing a reopening application because to do so, a provider physically

examines the worker and performs a comprehensive medical assessment to determine the presence of objective worsening. The provider:

- obtains a detailed history from the patient to understand the previous injury (CP 265-66),
- determines whether the worker sustained any new injuries or illnesses (CP 265), and
- performs a physical examination to assess whether the worker has physical findings that support objective worsening of the industrial injury or occupational disease since claim closure. CP 266.

As observed by the Board's dissenting member, "[h]ow is that different than any other treatment situation?" *Ma'ae*, 2015 WL 7873351, at *7. In receiving this care, a worker deserves a highly qualified medical provider who will adhere to occupational health best practices. RCW 51.36.010. A nonnetwork provider who does not adhere to occupational health best practices may not know or disregard the importance of ascertaining objective findings, and may file a reopening application that does not appropriately document worsening.[9]

Finally, the provision of medical care and documentation for reopening applications also serves as a gateway to further treatment, and requires the Department to cover treatment a worker may have received.

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[9]Less than half of one percent (.03%) of providers are refused entry into the provider network because they do not meet minimum network criteria. http://www.lni.wa.gov/ClaimsIns/Providers/ProjResearchComm/PNAG/ACHIEV012617/KarenMPNUpdate.pdf

Under WAC 296-20-097, a provider gets reimbursed for treatment given 60 days before the application. This doctor would have to be a network provider for the Department to be able to pay the network provider for this service: the regulations show the interconnected nature of care under the Industrial Insurance Act. RCW 51.36.010; WAC 296-20-015.

The court assumes the validity of administrative rules adopted under a legislative grant of authority and upholds such rules if they are "reasonably consistent with the statute being implemented." *Green River Cmty. Coll., Dist. No. 10 v. Higher Ed. Pers. Bd.*, 95 Wn.2d 108, 112, 622 P.2d 826 (1980). The medical provider completing the reopening application must be a network provider because the provider provides care to a worker when examining the worker and completing the reopening application. Because the provider provides "care" to a worker, RCW 51.36.010(10) authorizes the Department to adopt rules implementing the provider network requirement in the reopening context. WAC 296-14-400 is reasonably consistent with RCW 51.36.010 because it restricts the care of nonnetwork providers to non-initial office/emergency room visit situations. So it does not exceed statutory authority under RCW 34.05.570(2)(c).

B. The Legislature Has Balanced the Need for Quick Access and Quality of Care, and the Court Should Not Second-Guess It

Contrary to Ma'ae's suggestion, limiting the care of injured workers to high quality providers furthers RCW 51.36.010's purposes and the Industrial Insurance Act's purposes as a whole. Ma'ae argues that the "legislature signaled its intent to maintain quick access to the workers' compensation system by maintaining an injured worker's right to see non-network providers for an initial office or emergency room visit[,]" and argues this policy encompasses quick access for reopening. Appellant's Br. 15. Relatedly, Ma'ae argues that restricting medical treatment and documentation for reopening applications is contrary to the "intent of the Legislature to provide swift and certain relief under title 51." Appellant's Br. 14-15.

These arguments fail for three reasons. First, the Legislature does value quick access, but it limited this to the initial office or emergency room visit situation. The Legislature required care from a network provider in all other circumstances, including treatment and documentation for a reopening application. Ma'ae is wrong that the Legislature did not intend to restrict injured worker access to just network providers. *See* Appellant's Br. 14-15. The Legislature did so by allowing workers to only receive care from qualified medical providers that meet minimum standards and adhere to occupational health best practices. RCW 51.36.010(1), .010(2)(b).

Second, while ensuring that workers receive swift and certain relief is one purpose of the Industrial Insurance Act, the Act also has the purposes of "prevent[ing] disability and reduc[ing] loss of family income for workers, and lower[ing] labor and insurance costs for employers." RCW 51.36.010(1). Ensuring that workers receive care only from high quality providers who meet minimum standards and who follow current health care best practices helps prevent disability and reduces the loss of family income resulting from workplace injuries. Further, receiving care from substandard practitioners will inevitably delay a worker's recovery from an injury and increase a worker's losses due to an injury. RCW 51.12.010 looks to reducing the suffering caused by industrial injuries.[10] Reducing suffering resulting from the disability and loss associated with workplace injuries is no less a fundamental purpose of the Industrial Insurance Act then ensuring that workers receive swift relief.

Third, in creating the provider network, the Legislature struck a careful balance between the need to have swift access to care and the need to receive high quality care by carving out a limited exception for care.

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[10] Ma'ae invokes this canon of liberal construction here. Appellant's Br. 8, 16. But the court does not apply the liberal construction rule in in a workers' compensation case where the statutory language is unambiguous. *See Raum v. City of Bellevue*, 171 Wn. App. 124, 155 n.28, 286 P.3d 695 (2012). In any event, liberal construction points to reducing workers' suffering by promoting the purposes of the provider network to benefit all workers.

RCW 51.36.010(2)(b). RCW 51.36.010(2)(b) ensures that workers can receive swift care immediately after an injury, at a time when immediate access to care arguably has the highest priority. But the Legislature also recognized that the policy concerns are different in the context of an aggravation of a prior injury. In this context, quick access is no longer the paramount concern because the Department has already allowed the claim, paid for treatment, and closed it. CP 90, 265-66. Instead, in the reopening context the primary concern is to ensure that injured workers are treated with qualified providers who will adhere to occupational best practices and meet minimum standards. It is the Legislature's role to weigh these interests and strike a balance, as the Legislature has done here.

C. WAC 296-14-400 and RCW 51.36.010 Are Consistent with the Reopening Statute, RCW 51.32.160, Because to Implement the Provider Network the Legislature Does Not Need to Amend Every Statute That Implicates a Physician

When the Legislature amended RCW 51.36.010, it directed the Department to establish the provider network and granted broad statutory authority to the Department to develop rules regarding credentialing, accreditation, and continued network oversight. RCW 51.36.010(1), .010(2)(c), .010(10). Ma'ae argues that if the Legislature had intended to change the parameters for filing a reopening application it would have amended the aggravation statute, RCW 51.32.160. Appellant's Br. 18. But

the Legislature granted broad authority to the Department to adopt rules to establish and oversee the behavior of doctors, and this includes when doctors act in the reopening context to determine if the worker's condition has become aggravated.

The Legislature did not need to amend individual statutes, such as RCW 51.32.160, to carry out the broader scheme of the provider network once the Legislature defined who may serve as a medical provider in the workers' compensation system. It is well-established that definitional terms govern throughout a statutory scheme if the context compels this, as it does here. *See AllianceOne Receivables Mgmt., Inc. v. Lewis*, 180 Wn.2d 389, 396, 325 P.3d 904 (2014). Thus, RCW 51.36.010's definition of who may serve as a provider applies throughout the Industrial Insurance Act.

There are many references to physicians and providers in the Industrial Insurance Act.[11] The Legislature and Department did not need to amend each instance where the Act and regulations provides directions

[11] *E.g.*, RCW 51.32.090 (physician certifies when a worker is able to perform available work) ; RCW 51.32.095 (attending physician verifies necessity of job modifications); RCW 51.36.015 (chiropractic care and evaluation); RCW 51.36.060 (duties of attending physician); RCW 51.36.100 (audits of health care providers); RCW 51.36.130 (denial of application of health care providers due to false, misleading or deceptive advertising or representations); WAC 296-20 (medical aid rules defining duties and roles of providers).

about providers.[12] It is well-established that statutes are interpreted harmoniously. *State v. Velasquez*, 176 Wn.2d 333, 336, 292 P.3d 92 (2013). The court must interpret actions taken under RCW 51.32.160 in a manner that is consistent with RCW 51.36.010's dictates. Any other interpretation would frustrate the Legislature's intent to have providers who are well-trained and understand occupational health considerations involved in rendering care and opinions about a worker's care. The Court cannot view provisions in the Act in isolation because it is a comprehensive act designed as a whole to regulate the treatment and benefits of those injured on the job or who have an occupational disease. RCW 51.04.010. This Court must uphold rules if they are "reasonably consistent with the statute being implemented." *Green River Cmty. Coll.*, 95 Wn.2d at 112. Ma'ae has failed to meet his burden to show that the Department is not reasonably consistent with RCW 51.36.010. The trial court correctly ruled that the Department did not exceed its statutory authority in amending WAC 296-14-400.

D. WAC 296-14-400's Amendment Is Not Arbitrary and

[12] For example, RCW 51.32.090 provides that a physician or licensed registered nurse practitioner provide certification regarding the worker's ability to work. The Legislature did not need to amend this provision to say that the doctor and the nurse must be network providers. This is because the qualifications of who may treat or care for workers is defined by RCW 51.36.010's requirement to have a network provider, reading the statutory scheme as a whole. Any other conclusion would defeat the purpose of the network.

Capricious Under RCW 34.05.570(2)(c) Because the Department Considered the Relevant Circumstances

The trial court properly decided that the amendment to WAC 296-14-400 was not arbitrary and capricious because the Department considered the relevant circumstances. Agency action is arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances. *Wash. Indep. Tel. Ass'n*, 148 Wn.2d at 905. "Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous." *Id.* (quotations omitted). Not only does Ma'ae not show erroneous action, he has not met his burden to show that the Department amended WAC 296-14-400 without considering the relevant facts and circumstances.

1. The Department considered the statutory language of RCW 51.36.010

In amending the regulation, the Department, and its statutory advisory committee PNAG, considered the statutory language of RCW 51.36.010. After reviewing RCW 51.36.010(2)(b), the Department determined that "there is no exception for reopening" because medical treatment and documentation for a reopening application does not constitute an "initial visit." CP 75, 89-92, 104. The Department considered this language in its context to provide excellent care to workers to further

the purposes of the Industrial Insurance Act as a whole. While the question of whether a worker has an initial injury or aggravation may require extended consideration this does not change that the Legislature limited nonnetwork providers to only treating workers in the initial or emergency room visit situation. Ma'ae references a scenario where an injured worker has a visit with a nonnetwork provider and it takes several months to determine whether the worker has sustained an aggravation of an old injury or whether he or she has a new injury. Appellant's Br. 20-21. It is possible that a scenario could occur where an aggravation requires an injured worker to seek immediate or urgent care with a nonnetwork provider and it takes time for that nonnetwork provider to determine the cause of the condition. But if that scenario occurs the nonnetwork provider would simply recommend that the injured worker transfer his or her care to a network provider to examine the injured worker and complete an application to reopen. Contrary to Ma'ae's suggestion, nonnetwork providers know their limitations.[13]

Further, in the context of considering the statutory language, the Department examined what services are part of an initial visit under RCW

[13] Further, contrary to Ma'ae's arguments, the fact that out-of-state doctors are not eligible to join the network does not add to the confusion. The provisions of RCW 51.36.010 apply only after a provider network is established in an injured worker's geographic area. The provider network has not been established outside of Washington.

51.36.010(2)(b). The Department amended WAC 296-20-015 and WAC 296-20-025 to include hospitalization services resulting directly from an initial emergency room visit and services that are bundled with those performed during the initial visit as part of the "initial office or emergency room visit." CP 83-87, 103-04, 187-91. Contrary to Ma'ae's assertions, this does not show that the rule amendment was arbitrary and capricious. Appellant's Br. 18. Both of these examples involve situations where an injured worker receives care that merely continues the "first visit to a health care provider during which the Report of Industrial Injury or Occupational Disease is completed and the worker files a claim for workers compensation." WAC 296-20-01002 (definition of "initial visit"). In contrast, a doctor provides medical treatment and documentation for reopening applications often years after the initial visit—after treatment and claim closure in the interim—and this is not a continuation of the initial visit.

2. The Department considered the context of reopening a claim

The Department considered the context in which a network provider completes a reopening examination and documentation. CP 89-92. The completion of an application to reopen is factually distinct from completion of an initial report of injury or occupational disease because of

when the completion occurs. CP 89-92, 265-66. When an injured worker initially seeks treatment for the injury or occupational disease access to immediate care can be important to reduce the problems that delays in care may cause. CP 156. So it makes sense to prioritize access to care in these limited circumstances. In contrast, a provider completes an application to reopen months or years *after* the claim has already been allowed and closed. CP 89, 265-66.

3. The Department considered the Legislature's intent in enacting the provider network

The Department considered the overarching legislative intent of RCW 51.36.010 to provide injured workers with the "high quality medical care they deserved in accordance with current best practices" in amending WAC 296-14-400. RCW 51.36.010(1). The Department gave due consideration to the fact that the legislative means of increasing the quality of care provided to injured workers was by "reducing the influence of providers who do not meet network standards." CP 92, 104.

It is not enough for this Court to think that the Department erroneously amended WAC 296-14-400; under well-established principles, a rule that a court believes is erroneous still stands. *Wash. Indep. Tel. Ass'n*, 148 Wn 2d at 905. Instead, the record must show that the Department did not give due consideration to the facts and

circumstances when it amended the rule. Here, the record only shows the appropriate consideration.[14]

VI. CONCLUSION

Ma'ae has not met the heavy burden to show the rule is not reasonably consistent with the statute being implemented or to show arbitrariness. WAC 296-14-400 is not only "reasonably consistent" with RCW 51.36.010, but furthers the Legislature's intent to provide injured workers with the high quality care they deserve by limiting their access to nonnetwork providers that fail to meet minimum network standards. The rulemaking file provides ample evidence that the Department amended WAC 296-14-400 after carefully considering the relevant circumstances and Ma'ae has presented no compelling evidence that the Department's actions were willful and unreasoning.

This Court should affirm and hold that WAC 296-14-400 is a valid legislative rule.

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[14] Ma'ae asks for attorney fees under RCW 4.84.010, RCW 4.84.030, and RAP 18.1. Appellant's Br. 23-24. Not only is he not entitled to fees because he should not prevail, but he is also not entitled to fees because he does not state a basis on which the Court may grant fees. RAP 18.1(a) requires a basis for attorney fees: namely, the "applicable law." RCW 4.84.010 and RCW 4.84.030 provide for costs, not fees. Statutory attorney fees under RCW 4.84.080 provide for only $200, and is a cost, not an attorney fee under RAP 18.1. In the absence of a contractual, statutory, or recognized equitable basis, no fees are owed. *Interlake Sporting Ass'n, Inc. v. Washington State Boundary Review Bd. for King Cty.*, 158 Wn.2d 545, 560, 146 P.3d 904 (2006).

Finally, should Ma'ae prevail in this appeal, he should not receive costs under RCW 4.84.010, but rather receive them under RAP 14.3.

RESPECTFULLY SUBMITTED this 26 day of June 2017.

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NO. 49659-3-II

COURT OF APPEALS FOR DIVISION II
THE STATE OF WASHINGTON

RONALD V. MA'AE

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent.

CERTIFICATE OF SERIVCE

DATED June 26, 2017, at Seattle, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I caused to be served Brief of Respondant and Certificate of Service to counsel for all parties on the record in the below described manner:

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DATED this 26th day of June, 2017.

Jessica Sparks
Legal Assistant

WASHINGTON ST. ATTORNEY GENERAL - LABOR & INDUSTRIES DIVISION - SEATTLE

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